

FILED

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

AUG 09 1999

PEGGY B. DEANS, CLERK
U.S. BANKRUPTCY COURT
EASTERN DISTRICT OF N.C.

IN RE:)	
)	
INTERNATIONAL HERITAGE, INC.)	CHAPTER 7
)	CASE NO. 98-02675-5-ATS
INTERNATIONAL HERITAGE,)	
INCORPORATED,)	CHAPTER 7
)	CASE NO. 98-02674-5-ATS
Debtors.)	

**APPLICATION OF TRUSTEE FOR
AUTHORITY TO ENTER INTO SETTLEMENT AGREEMENT**

NOW COMES Holmes P. Harden, Trustee for the above-captioned Debtors, and requests an order authorizing him to enter into a Settlement Agreement with Stanley H. Van Etten ("Van Etten"), Claude W. Savage ("Savage"), Larry G. Smith ("Smith"), and Executive Risk Specialty Insurance Company ("ERSIC"), a copy of which is attached as Exhibit A and incorporated herein by reference. In support of this Application, Trustee states as follows:

1. International Heritage, Inc. and International Heritage, Incorporated filed voluntary petitions in bankruptcy on November 25, 1998 and Holmes P. Harden ("Trustee") was appointed Chapter 7 Trustee.
2. On or about August 19, 1998, ERSIC commenced an action against International Heritage, Inc. ("Debtor"), Van Etten, Savage and Smith in the United States District Court for the Eastern District of North Carolina, captioned Executive Risk Specialty Ins. Co. v. International Heritage, et al., Case No. 5:98-CV-542-F(3)(E.D.N.C.) ("ERSIC Action"). On March 18, 1999, Trustee commenced an adversary proceeding against ERSIC captioned Holmes

24 pgs

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P. Harden, Trustee in Bankruptcy for International Heritage, Inc. v. Executive Risk Specialty Ins. Co., Adversary Proceeding No. S-99-00015-5-AP (Bankr. E.D.N.C.) (“Trustee Action”) (collectively “the Coverage Actions”).

3. The Coverage Actions are complaints for declaratory relief concerning the coverage afforded under a Directors and Officers Liability Insurance Policy, including Securities Claims Coverage and Automatic Reinstatement of the Limit of Liability for Unindemnifiable Loss Designed for Initial Public Offerings No. 751-070526-97 issued by ERSIC to Debtor effective from June 23, 1997 through June 23, 1998, extended by endorsement through July 23, 1998 (“the Policy”).

4. The Policy has limits of liability in the amount of \$5,000,000.00 maximum aggregate for all claims made during any single policy year. Prior to the Coverage Actions being commenced, ERSIC advanced, on an interim basis, \$500,000.00 in reimbursement of defense costs incurred by Debtor and the officers and directors of Debtor pending resolution of the Coverage Actions. ERSIC has filed a proof of claim asserting that Debtor will be required to repay ERSIC the \$500,000.00 advanced for defense costs to the extent it is determined that such amounts do not constitute loss under the Policy.

5. Van Etten, Savage and Smith, as Officers and Directors of the Debtor, are also insureds under the Policy and parties to the Settlement Agreement.

6. Trustee alleges in the Trustee Action that losses incurred by Debtor as a result of certain underlying actions (“the underlying actions”) commenced against it during the policy period (which underlying actions are specifically enumerated in Paragraph No. 15 of the First Amended Complaint for Declaratory Relief in the Trustee Action) are covered under the Policy.

7. ERSIC denies that the aforescribed losses are covered under the Policy. In the ERSIC Action, ERSIC seeks a declaration that the Policy does not provide any coverage for any loss incurred by Debtor and/or the directors and officers in the underlying actions on the grounds that the Policy (which includes the application thereto) does not apply to “any claim arising from any claims, facts, circumstances or situations required to be disclosed in response to [Question] 5.c.)” of the application, and the underlying actions arise from the claims, facts, circumstances and situations which Debtor disclosed in response to Question 5.c of the application.

8. ERSIC and Trustee are in disagreement regarding the coverage afforded to Debtor under the Policy for the underlying actions, including attorneys fees. After due consideration of the merits of each party’s respective contentions regarding the coverage issue, as set forth in the Coverage Actions, Trustee believes it is in the best interest of creditors to enter into the Settlement Agreement with ERSIC.

9. Trustee, ERSIC, Van Etten, Savage and Smith propose a settlement of the Coverage Actions whereby \$1,787,500.00 will be paid by ERSIC to Trustee and \$275,000.00 will be paid by ERSIC to Van Etten in reimbursement for attorneys fees and expenses incurred in the underlying actions.

10. Pursuant to the Settlement Agreement, ERSIC will obtain releases from Debtor, Van Etten, Savage and Smith.

11. The Settlement Agreement is contingent upon the Court granting a Motion for 11 U.S.C. § 105 injunction filed by Trustee in the Adversary Proceeding No. S-99-00043-5-AP, extending the automatic stay to all codefendants in the underlying actions enumerate therein.

12. Trustee believes the proposed settlement is fair and reasonable.

13. Trustee is of the opinion that settling the above described controversy is in the best interest of the expeditious administration of the Debtor's estate, given the merits of the defenses and the complexity, expense, inconvenience and delay of litigation. Trustee therefore deems it appropriate and consistent with his duties to enter into the Settlement Agreement with ERSIC, Van Etten, Savage and Smith which settlement by its terms, inter alia, (a) brings substantial revenue into the Bankruptcy Estate without incurring additional costs or expenses, and (b) avoids complicated litigation concerning the insurance coverage issues.

14. Trustee is authorized to execute the Settlement Agreement with court approval.

WHEREFORE, Trustee prays that the Court authorize him to enter into a Settlement Agreement in the form attached hereto as Exhibit "A" on behalf of the Debtor corporations.

This the 9th day of August, 1999.

MAUPIN TAYLOR & ELLIS, P.A.

BY: 

Holmes P. Harden
Trustee for International Heritage, Inc., Debtors
N. C. State Bar No. 9835
Post Office Drawer 19764
Raleigh, NC 27619
Telephone: (919) 981-4000

SETTLEMENT AGREEMENT AND RELEASE

This SETTLEMENT AGREEMENT AND RELEASE ("Agreement") is made and entered into this _____ day of August, 1999, by and between Holmes P. Harden, as Bankruptcy Trustee for International Heritage, Inc. (the "Trustee"), Stanley H. Van Etten ("Van Etten"), Claude W. Savage ("Savage"), Larry G. Smith ("Smith"), and Executive Risk Specialty Insurance Company ("ERSIC") (collectively, the "Parties").

WHEREAS, ERSIC issued Directors and Officers Liability Insurance Policy Including Securities Claims Coverage and Automatic Reinstatement of the Limit of Liability for Unindemnifiable Loss Designed for Initial Public Offerings No. 751-070526-97, to International Heritage, Inc. ("IHI") for the period June 23, 1997 to June 23, 1998, extended by endorsement through July 23, 1998 (the "Policy");

WHEREAS, in various capacities, IHI and/or IHI's directors and officers Van Etten, Savage, and Smith (collectively, the "Directors and Officers") have been named as defendants in the matters captioned Securities and Exchange Commission v. International Heritage, Inc., et al., No. 98-CV-0803 (N.D. Ga.); Meckenstock, et al. v. International Heritage, Inc., et al., No. 5:98-CV-237-BR-2 (E.D.N.C.); Liebendorfer v. International Heritage, Inc., No. DV98-2241 (Tex. Dist. Ct.); Marsh v. International Heritage, Inc., et al., No. 98-2332-E (Tex. Dist. Ct.); Greene, et al. v. International Heritage, Inc., et al., No. CV-98-42 (Ala. Cir. Ct.); Swinney, et al. v. Van Etten, et al., No. 98 CV 04277 (N.C. Super. Ct.); Gilbert v. International Heritage, Inc., et al., No. CV-98-277 (Ala. Cir. Ct.); and In the Matter of International Heritage, Inc., et al., No. I-04-02-98-04 (Mont. State Auditor's Off.) (collectively, the "Underlying Actions").

WHEREAS, IHI and the Directors and Officers have sought coverage under the Policy for payment of defense expenses and all other losses resulting from the Underlying Actions;

WHEREAS, there has been a dispute between ERSIC and IHI and the Directors and Officers regarding whether there is coverage for the Underlying Actions under the Policy, which dispute has been the subject of both a declaratory judgment action brought by ERSIC against the Directors and Officers and IHI (and from which IHI was dismissed following notice of its filing for bankruptcy), captioned Executive Risk Specialty Insurance Co. v. International Heritage, et al., Case No. 5:98-CV-542-F(3) (E.D.N.C.) ("ERSIC's Coverage Action"), and an adversary proceeding brought by the Trustee against ERSIC, captioned Holmes P. Harden, Trustee in Bankruptcy for International Heritage, Inc. v. Executive Risk Specialty Insurance Co., Adversary Proceeding No. 5:98-00015-5-AP (Bankr. E.D.N.C.) (the "Trustee's Coverage Action");

WHEREAS, ERSIC's Coverage Action seeks a declaration that the Policy does not provide any coverage for any loss incurred by IHI and/or the Directors and Officers in connection with the Underlying Actions on the grounds that, by its terms, the Policy (which includes the application thereto) does not apply to "any claim arising from any claims, facts, circumstances or situations required to be disclosed in response to . . . [Question] 5.c)" of

the application, and the Underlying Actions arise from the claims, facts, circumstances and situations that IHI was required to, and did, disclose in the application in response to Question 5.c);

WHEREAS, ERSIC has advanced, on an interim basis, \$500,000 in reimbursement of defense costs incurred by IHI and the Directors and Officers, pending resolution of ERSIC's Coverage Action, and ERSIC has filed a Proof of Claim form in the IHI bankruptcy proceeding, captioned In re: International Heritage, Inc., Case No. 98-02675-5-ATS (Bankr. E.D.N.C.) (the "Bankruptcy Proceeding"), notifying the Bankruptcy Court that IHI will be obligated to repay ERSIC the \$500,000 advanced for defense costs in the event that it is established that such amounts do not constitute loss covered under the Policy;

WHEREAS, the Trustee's Coverage Action seeks a declaration that the Policy affords coverage for the loss arising from the Underlying Actions, including defense expenses, and an order declaring that IHI is entitled to recover immediately from ERSIC an amount in excess of \$800,000 in reimbursement of defense expenses;

WHEREAS, the Trustee, the Directors and Officers, and ERSIC desire to compromise, settle and relinquish all claims which IHI, the Directors and Officers and/or any other Insured as defined in the Policy may have arising from the Underlying Actions, in return for the payment and receipt of good and valuable consideration from ERSIC; and

WHEREAS, the Trustee has reviewed the allegations of ERSIC with respect to the coverage issues and has determined in his business judgment that a resolution by way of this proposed settlement is appropriate and is in the best interest of the estate;

NOW, THEREFORE, in consideration of the mutual agreements and covenants set forth herein, and other good and valuable consideration, the Trustee, the Directors and Officers, and ERSIC hereby agree as follows:

1. The Trustee promptly shall file a motion in the Trustee's Coverage Action seeking the Court's approval of this settlement pursuant to Bankruptcy Rule 9019. Among other things, the Trustee's motion shall request that the Bankruptcy Court enter a final order and judgment approving the proposed settlement, and finding that ERSIC is released from any and all obligations under the Policy, whether known or unknown, anticipated or unanticipated, past, present or future. The Trustee shall serve the motion on all parties to the Underlying Actions and also shall provide notice of the proposed settlement to all interested parties, including, without limitation, all parties to the Underlying Actions and all of IHI's creditors (the "Interested Parties"). Among other things, the Trustee's notice shall apprise the Interested Parties of the material terms of the proposed settlement, the deadline and procedure for submission of any objection to the proposed settlement, and the date the Court will conduct a hearing on the Trustee's motion to approve the proposed settlement.

2. If, for any reason, the Court does not enter an order approving the proposed settlement in a form acceptable to ERSIC, then ERSIC, in its sole discretion, may terminate this Agreement, in which case this Agreement shall become null and void and the parties

hereto shall be restored to the status quo ante existing prior to the execution of the Agreement.

3. If the Court enters an order: (i) approving the proposed settlement; and (ii) declaring that ERSIC has no obligations whatsoever under the Policy, once such order becomes final; that is, the settlement documentation has been approved by final order of the United States District Court for the Eastern District of North Carolina, and that order has become final, either because the time period in which to take a timely appeal from the order has expired, or, in the case of an appeal from such order, the order has been upheld on appeal and all further rights of appeal or petitions for certiorari have been completely exhausted, then:

a. Within ten (10) days of the date the approval of the settlement becomes final, and after all conditions set forth in Paragraph 6 are satisfied, ERSIC shall pay to IHI's bankruptcy Trustee \$1,787,500 and to Stanley Van Etten \$275,000. The payments specified in this paragraph, along with the \$500,000 previously advanced to IHI, shall, in accordance with this Agreement, constitute the entirety of ERSIC's payment obligations pursuant to the Policy;

b. ERSIC shall dismiss its claims against the Directors and Officers in ERSIC's Coverage Action;

c. ERSIC shall withdraw its Proof of Claim filed in the Bankruptcy Proceeding;

d. The Trustee shall dismiss his claim against ERSIC in the Adversary Proceeding; and

e. The Trustee, the Directors and Officers, and ERSIC, and their affiliates, heirs, predecessors, successors, assigns and all third persons claiming through them shall release each other and their respective affiliates, employees, directors, officers, attorneys, claim managers, reinsurers, agents and any professionals retained by them from any and all claims, debts, demands, obligations, damages, liabilities, benefits, costs and causes of action, of whatever kind or character, known or unknown, past, present or future, that they have, had, or may have against each other or their respective affiliates, employees, directors, officers, attorneys, claim managers, reinsurers, agents and any professionals retained by them, whether or not asserted in ERSIC's Coverage Action or in the Trustee's Coverage Action, on account of or in any way growing out of, based on or relating to: (a) the Policy; (b) the subject matter of any of the claims asserted in the Underlying Actions, including but not limited to the claim that IHI operates or has operated as an illegal pyramid scheme; and (c) the manner in which ERSIC, its affiliates, employees, directors, officers, attorneys, claim managers, reinsurers, agents and any professionals retained by them responded to, handled and resolved the claims for coverage under the Policy in connection with the Underlying Actions.

4. The Parties to this Agreement expressly assume the risk that acts, errors, omission, matters, causes, or things may have occurred which are not known or are not suspected to exist by one or more of them and waive the terms and provisions of any statute, rule or doctrine of common law which either narrowly construes releases purporting by their terms to release claims in whole or in part based upon, arising from, or related to such acts, omissions, matters, causes or things or which restricts or prohibits the releasing of such claims.

5. The Trustee and the Directors and Officers expressly represent and warrant that they have not sold, assigned, or otherwise transferred any interest in the claims, demands, payments, rights, obligations, loss, judgments, awards, attorneys' fees, costs, fees, interest, damages, liabilities, or causes of action related in any way to the Policy. In the event that such warranty is breached, the Trustee and the Directors and Officers expressly covenant to indemnify and hold harmless ERSIC from each and every claim or demand of any kind or character arising from breach of the representations and warranty contained here.

6. This Agreement is conditioned on, and will not become effective prior to

a. the dismissal with prejudice of all civil actions pending against IHI and/or the Directors and Officers as of the effective date of the settlement or the entry of an injunction by the Bankruptcy Court under 11 U.S.C. § 105 enjoining any such actions that have not been dismissed with prejudice by the effective date of the settlement;

b. the final approval of a settlement between IHI, the Directors and Officers and the Securities and Exchange Commission ("SEC") in connection with the action brought against IHI and the Directors and Officers by the SEC; and

c. the resolution and/or stay of the proceeding brought by the Montana State Auditor's Office against IHI and the Directors and Officers.

In the event that any of the above conditions are not satisfied, ERSIC, in its sole discretion, may terminate this Agreement, in which case this Agreement shall become null and void and the parties hereto shall be restored to the status quo ante existing prior to the execution of the Agreement.

7. The parties agree to execute promptly any and all documents of any nature or kind which the other parties may reasonably require in order to implement the provisions and objectives of this Agreement. The parties shall bear their own costs and fees incurred to implement the terms of this paragraph.

8. Notice regarding matters involving this Agreement to the Trustee shall be provided to:

James A. Roberts, III
James T. Johnson
Lewis & Roberts, P.L.L.C.
1305 Navaho Drive, Suite 400
Post Office Box 17529
Raleigh, NC 27619-7529

Notice to ERSIC shall be provided to:

Gary V. Dixon
Stacey L. McGraw
Ross, Dixon & Bell, L.L.P.
601 Pennsylvania Avenue, N.W.
North Building
Washington, D.C. 20004

Notice to the Directors and Officers shall be provided to:

Brent E. Wood
Wood & Francis, P.L.L.C.
Two Hannover Square
434 Fayetteville Street Mall, Suite 2300
Post Office Box 164
Raleigh, North Carolina 27602

or such other addresses as the parties to this Agreement may furnish to each other pursuant to the provisions of this paragraph.

9. The parties to this Agreement acknowledge and agree that neither entry into this Agreement nor the payment of any sum of money referenced in or pursuant to this Agreement shall constitute or be construed as an admission of liability by any party to any person or entity or as an admission of coverage under the Policy.

10. This Agreement constitutes the entire agreement between the Trustee and ERSIC and between the Directors and Officers and ERSIC regarding the settlement of IHI's and the Directors' and Officers' claims for insurance coverage in connection with loss incurred as a result of the Underlying Actions. The parties to this Agreement hereby agree that the only valid and enforceable modifications to this Agreement shall be those which are reduced to a writing and signed by all parties hereto, or by their respective counsel.

11. The validity and enforceability of this Agreement shall be governed by the laws of the State of North Carolina.

12. This Agreement is made and executed by each of the parties hereto with the advice of counsel, and no party hereto has been coerced or induced to make this compromise and settlement by any improper action of any other party hereto. This Agreement shall not be construed either in favor of or against any party by virtue of any rules of contract construction contended to be applicable to insurance policies, nor shall any Party be deemed to be the sole drafter hereof.

13. By their signatures below, the undersigned represent and warrant that they are duly authorized to bind the party or parties on whose behalf they have executed this Agreement.

14. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original and when taken together with the other signed counterparts, shall constitute one agreement which shall be binding upon and effective as to all parties.

IN WITNESS WHEREOF, each of the parties has executed this Agreement on the day and year indicated below.

Executive Risk Specialty Insurance Company

Date: _____

By: _____

Holmes P. Hurdén, as bankruptcy Trustee
for International Heritage, Inc.

Date: _____

Stanley H. Van Etten

Date: _____

Claude W. Savage

Date: _____

Larry G. Smith

Date: _____

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

IN RE:)	CASE NO.: 98-02675-5-ATS
INTERNATIONAL HERITAGE, INC.)	
INTERNATIONAL HERITAGE,)	CASE NO.: 98-02674-5-ATS
INCORPORATED,)	
Address:)	CHAPTER 7
2626 Glenwood Avenue, #200)	
Raleigh, NC 27608)	
)	
TAX ID# 56-1921093)	
)	
Debtor.)	

**NOTICE OF APPLICATION OF TRUSTEE FOR AUTHORITY
TO ENTER INTO SETTLEMENT AGREEMENT**

TO: THE DEBTOR, ATTORNEY FOR THE DEBTOR, AND OTHER PARTIES IN INTEREST

NOTICE IS HEREBY GIVEN of the Application of Trustee for Authority to Enter into Settlement Agreement with Executive Risk Specialty Insurance Company, Stanley H. VanEtten, Claude W. Savage and Larry G. Smith. According to the proposed settlement, Executive Risk Specialty Insurance Company ("ERSIC") will pay \$1,787,500.00 to Holmes P. Harden, Trustee for International Heritage, Inc. in settlement of Holmes P. Harden, Trustee in Bankruptcy for International Heritage, Inc. v. Executive Risk Specialty Insurance Company, AP# S-99-00015-5-AP (Bankr. EDNC) by which Harden seeks declaratory relief concerning coverage afforded by a directors and officers liability insurance policy issued by ERSIC. ERSIC will also pay \$275,000.00 to Stanley H. VanEtten to resolve Mr. VanEtten's independent claim against ERSIC for coverage under the same directors and officers liability insurance policy.

An objection to this Application may be filed with the Clerk, United States Bankruptcy Court, Post Office Box 1441, Raleigh, North Carolina 27602, with a copy served on the trustee whose name appears at the bottom of this notice, within twenty (20) days of the date of the mailing of this notice. A hearing on any objections to this Application for Authority to Enter into Settlement Agreement will be held on September 1, 1999 at 9:00 a.m. at the United States Courthouse and Post Office Building, Room 208, 300 Fayetteville Street Mall, Raleigh, North Carolina. Any party requesting a hearing shall appear at said hearing in support of such request or he may be assessed with costs.

FURTHER NOTICE IS HEREBY GIVEN that if a response and a request for a hearing is filed by the Debtor or other party in interest named herein in writing within the time indicated, a hearing will be conducted on the Application and all interested parties will be notified accordingly. If no request for a hearing is timely filed, the Court may rule on the Application and response thereto ex parte without further notice.

DATE OF NOTICE: August 9th 1999.

MAUPIN TAYLOR & ELLIS, P.A.

BY: 

Holmes P. Harden, Trustee

N. C. State Bar No. 9835

Post Office Drawer 19764

Raleigh, NC 27619-9764

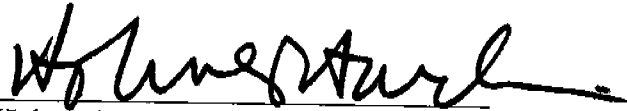
Telephone: 919/981-4000

Facsimile: 919/981-4300

CERTIFICATE OF SERVICE

I, Holmes P. Harden, Chapter 7 Trustee, do hereby certify that the foregoing **NOTICE OF APPLICATION OF TRUSTEE FOR AUTHORITY TO ENTER INTO SETTLEMENT AGREEMENT** was served upon all parties of record by mailing a copy thereof to each such party at the address indicated below with its proper postage attached and deposited in an official depository under the exclusive care and custody of the United States Post Office, in Raleigh, North Carolina, and by public notice via 888/895-8385 and 919-981-4033 and www.nceb.uscourts.gov. And by e-mail on the 29th day of August, 1999.

MAUPIN TAYLOR & ELLIS, P.A.



Holmes P. Harden
N.C. State Bar No. 9835
3200 Beechleaf Court, Suite 500
Post Office Drawer 19764
Raleigh, NC 27619
Telephone: 919/981-4000
Facsimile: 919/981-4300

SERVED:

Marjorie K. Lynch
Bankruptcy Administrator
U. S. Bankruptcy Court
P. O. Box 3079
Raleigh, NC 27602

SEE ATTACHED MAILING MATRIX

SEE ATTACHED E-MAIL LIST

MAUPIN TAYLOR & ELLIS, P.A.

MAILING ADDRESS
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RALEIGH, NORTH CAROLINA 27619-9764
TELEFAX (919) 981-4300

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3200 BEECHLEAF COURT
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411 ANDREWS ROAD, SUITE 150
DURHAM, NORTH CAROLINA 27705
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FACSIMILE TRANSMISSION

CONFIDENTIAL []

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TO: *Chittenden Bank*
c/o Louis P. Rochkind
Jaffe, Raitt, Heuer & Weiss
One Woodward Avenue, Suite 2400
Detroit, MI 48226

FROM: *Holmes P. Harden*
MAUPIN TAYLOR & ELLIS, P.A.
POST OFFICE DRAWER 19764
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DIRECT DIAL #: 919-981-4011

CITY: _____

DATE: **August 9, 1999**

FACSIMILE #: 313-961-8358

OUR FILE NUMBER: BANK7A-206

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Case 98-02675-5-DMW
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Doc 192 Filed 08/09/99 Entered 08/09/99 00:00:00
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